Message Text

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ACTION SS-25

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FM AMEMBASSY SANTIAGO
TO SECSTATE WASHDC 5012

S E C R E T SECTION 1 OF 2 SANTIAGO 3295

EXDIS

E.O. 11652: GDS
TAGS: CI, PFOR, BDIS
SUBJECT: US-CHILE NEGOTIATIONS

REF: STATE 072125, 137514

1. SUMMARY. ALL OF THE ATTORNEYS CONSULTED BY THE EMBASSY INDICATED THAT THE MOST CORRECT MANNER TO PROCEED WOULD BE TO SEEK LEGISLATION OR A CONSTITUTIONAL AMENDMENT. SEVERAL, HOWEVER, WENT ON TO STATE THAT THE COPPER PROBLEM WAS UNIQUE AND THAT THE GOVERNMENT COULD FIND OTHER LEGAL SOLUTIONS WITHOUT SEEKING PRIOR CONGRESSIONAL ASSENT. END SUMMARY.

2. SINCE RECEIVING DEPT'S REQUEST (STATE 72125), EMBASSY HAS CONSULTED AT SOME LENGTH WITH A NUMBER OF CHILE'S MOST PROMINENT LAWYERS INCLUDING LEADING CONSTITUTIONALIST ALEJANDRO SILVA BASCUNAN, INTERNATIONAL LAW PROFESSOR EDMUNDO VARGAS, AND HIGHLY REGARDED GENERAL PRACTITIONERS RAUL DE LA FUENTE, THE CLARO FIRM, AND OPIC LOCAL COUNSEL. (SEVERAL ADDITIONAL CONVERSATIONS ON THIS SUBJECT HAVE PREVIOUSLY BEEN REPORTED IN SANTIAGO 1159, 1605, 1488 AND 2918 AND IN ATTACHMENTS TO DAVIS/FISHER LETTER OF FEBRUARY 7.) THE SUBJECT MATTER OF THE INQUIRY IS SUFFICIENTLY COMPLEX THAT FEW OF THOSE CONSULTED WERE WILLING TO DESCRIBE THEIR OPINIONS AS DEFINITIVE. IN SOME CASES THIS WAS DUE TO THEIR FEELING THAT FURTHER STUDY WOULD BE ADVISABLE AND IN OTHERS TO THE FACT THAT WE ARE DEALING WITH A NOVEL PROBLEM FOR WHICH HELPFUL PRECEDENTS ARE VIRTUALLY NON-EXISTENT. THE ESSENTIAL POINT IN QUESTION IS NOT SPECIFICALLY DEALT
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WITH BY THE CONSTITUTION OR OTHER SOURCES OF CHILEAN LAW. IT

REQUIRES A HARMONIZATION AMONG THE CHILEAN CONSTITUTION,
TREATIES AND INTERNATIONAL LAW.

3. SILVA BASCUNAN AND VARGAS WERE CONSULTED ONLY AS TO THE POSSIBILITY

OF BINDING ARBITRATION WITHOUT FURTHER LEGISLATION OR A NEW CONSTITUTIONAL AMENDMENT. SILVA BASCUNAN ARGUED THAT THOUGH THE PRESIDENT MIGHT STRETCH HIS FOREIGN AFFAIRS POWERS TO AGREE TO ARBITRATION WITHOUT FIRST SEEKING CONGRESSIONAL APPROVAL, HE WOULD THEN HAVE TO SEEK FUNDS FROM THE CONGRESS TO MAKE ANY PAYMENT FOUND TO BE DUE. SINCE THIS IS SO, THE SPIRIT OF THE LAWS WOULD SEEM TO REQUIRE PRIOR AUTHORIZATION BY THE CONGRESS INDICATING AGREEMENT TO TAKE SUCH FURTHER STEPS AS MIGHT LATER BE REQUIRED (PERHAPS INCLUDING ADDITIONAL LEGISLATION) TO CARRY OUT TRIBUNAL'S FINDINGS.

4. EDMUNDO VARGAS WAS CATEGORICAL IN STATING THAT CHILEAN LAW INCORPORATED INTERNATIONAL LAW IN ITS DOMESTIC LAW BY AN UNBROKEN LINE OF JURISPRUDENCE. IT IS THEREFORE POSSIBLE, HE ARGUED, THAT THE TERMS OF A TREATY OR ELEMENTS OF INTERNATIONAL LAW COULD SUPERSEDE THE TERMS OF THE CHILEAN CONSTITUTION IN A GIVEN INSTANCE. IN THE PRESENT CASE, HOWEVER, DUE TO THE SPECIFICITY OF THE COPPER AMENDMENT, HE DOUBTED THAT A MEANINGFUL COMMITMENT TO BINDING ARBITRATION COULD BE MADE WITHOUT PRIOR CONSENT OF THE CONGRESS. A FORMAL SUBMISSION TO ARBITRATE WOULD, IN HIS OPINION, REQUIRE PRIOR CONGRESSIONAL APPROVAL OF THE SAME SORT REQUIRED FOR A NEW TREATY. ONE OF THE ALTERNATIVES EXPLORED WAS THE POSSIBILITY THAT THE GOVERNMENT MIGHT AGREE IN ADVANCE TO ACCEPT THE RECOMMENDATION OF THE COMMISSION ESTABLISHED IN ARTICLE II OF THE 1914 TREATY ON THE THEORY THAT ARTICLE IV ARGUABLY CONFERS AUTHORITY ON THE GOVERNMENT TO RESOLVE PROBLEMS ON THE BASIS OF THE COMMISSION'S FINDINGS PRIOR TO RESORTING TO THE PERMANENT COURT OF ARBITRATION AT THE HAGUE. (SEE SIMILAR ARGUMENT MADE BY STATE DEFENSE COUNCIL PRESIDENT TESTA TO AMBASSADOR IN SANTIAGO 1605.) VARGAS ACKNOWLEDGED THAT THE ARGUMENT HAD FORCE BUT STOPPED SHORT OF ENDORSING THIS AS THE PROPER LEGAL AVENUE TO BE FOLLOWED. TO BE FULLY LEGAL HE BELIEVED THAT PRIOR CONGRESSIONAL ASSENT WOULD HAVE TO BE SOUGHT. VARGAS ALSO COMMENTED THAT (DESPITE SOME JURISDICTIONAL PROBLEMS) RECURRENCE TO THE INTERNATIONAL COURT OF JUSTICE WAS, IN HIS OPINION, A POSSIBILITY WORTH

CONSIDERING AND THAT THE GOC COULD THEN JUSTIFY ANY PAYMENT DUE ON THE BASIS OF ITS RESPECT FOR THE DECISION OF THAT HIGH BODY. (THE CLARO FIRM ALSO SUPPORTED THIS PORTION OF VARGAS' OPINION.) IN THIS REGARD, VARGAS AND SEVERAL OTHER LAWYERS COMMENTED THAT GOC INSISTENCE THAT IT COULD NOT ASK FOR APPROVAL FROM THE CONGRESS NOW WAS PROBABLY A COVER-UP FOR THE REAL PROBLEM WHICH LIES WITHIN THE UP'S OWN FOLD. VARGAS, FOR INSTANCE, REPORTED A RECENT CONVERSATION WITH EX-PRESIDENT FREI ON THIS SUBJECT IN

WHICH FREI STATED THAT HE WOULD SUPPORT ANY REASONABLE SOLUTION
TO THE COPPER PROBLEM (SEE ALSO SANTIAGO 3268).

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S E C R E T SECTION 2 OF 2 SANTIAGO 3295

EXDIS

5. DE LA FUENTE, THE CLARO FIRM (RICARDO CLARO AND JORGE
STREETER) AND OPIC LOCAL COUNSEL, AGREED THAT FORMAL, BINDING
ARBITRATION REQUIRED PRIOR CONGRESSIONAL APPROVAL BUT BELIEVED
THAT ANOTHER SOLUTION (NOT INVOLVING THE CONGRESS) COULD BE FOUND
IF THE GOC WISHED TO FIND ONE. IF THE DECISION OF A NEUTRAL THIRD
PARTY SEEMED POLITICALLY CONVENIENT, THE ABOVE ARGUMENT BASED
ON ARTICLE IV OF 1914 TREATY MIGHT BE USED AS JUSTIFICATION. IF
THE TREATY IS IN FORCE, THEN THE GOC HAS POWER TO AGREE TO A SOLU-
TION BASED ON THE COMMISSION'S FINDINGS. IF A PAYMENT TO THE
COMPANIES WERE FOUND TO BE DUE, THE GOC MIGHT, INSTEAD OF
SEEKING APPROPRIATED FUNDS EARMARKED FOR PAYMENT OF INDEMNITY
TO THE COPPER COMPANIES, ENTER INTO WHAT THEY GENERALLY REFERRED
TO AS A "COMMERCIAL SOLUTION." THIS COULD INVOLVE SOME SORT OF
CONTRACTUAL ARRANGEMENT BETWEEN CODELCO OR ONE OF THE STATE-
OWNED COPPER COMPANIES AND EITHER THE U.S. COPPER COMPANIES
THEMSELVES OR A THIRD PARTY. IT MIGHT INCLUDE A FORMULA INVOLVING
PROCESSING AND SHIPPING COSTS WHICH COULD BE USED TO DISGUISE
THE ACTUAL PRICE PAID. THOUGH THE CONGRESS MIGHT COMPLAIN
(SINCE THE EXISTENCE OF AN AGREEMENT WOULD ALMOST CERTAINLY
BECOME PUBLIC KNOWLEDGE), THE GOC IS NOT OBLIGED TO GO TO THE
CONGRESS FOR AUTHORIZATION TO MAKE OPERATIONAL DECISIONS FOR
THESE ENTITIES - THOUGH THE LAWYERS EMPHASIZED THAT A REASONABLE
COVER STORY WOULD HAVE TO BE PROVIDED IN TERMS OF SOME SERVICES
THAT CHILE WOULD BE RECEIVING UNDER THE CONTRACT. IN THEORY,
MEMBERS OF CONGRESS MIGHT TRY TO STOP SUCH A TRANSACTION IN
THE COURTS, BUT IN PRACTICE THEY COULD DO NOTHING. FINALLY, THESE

LAWYERS AGAIN MENTIONED THE POSSIBILITY OF SOMEHOW USING THE
COPPER TRIBUNAL TO ASSIST IN ARRIVING AT A SOLUTION. SINCE THE GOC
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SEEMS TO TAKE THE POSITION THAT THE ANACONDA AND KENNECOTT APPEALS
ARE STILL PENDING BEFORE THE TRIBUNAL, IT PROBABLY COULD IF IT WISHED
STILL USE THE TRIBUNAL TO ASSIST IN A SOLUTION.

6. COMMENT. ARGUMENTS MADE BY THE LAWYERS CONSULTED DO NOT
CONTAIN THE DEGREE OF DETAIL AND CITATION OF AUTHORITY TO WHICH WE
ARE ACCUSTOMED IN THE US. THIS ARISES IN PART FROM PRACTICE IN
THE CHILEAN LEGAL SYSTEM AND IN PART FROM THE NATURE AND CIRCUM-
STANCES OF THE SPECIFIC INQUIRY. THE MOST CORRECT PATH WOULD CER-
TAINLY BE FOR THE GOC TO SEEK PRIOR CONGRESSIONAL AUTHORIZATION
TO NEGOTIATE A SOLUTION OR GO TO BINDING ARBITRATION. WHAT SOME
OF THE LAWYERS ARE TELLING US IS, HOWEVER, THAT THEY BELIEVE
THAT ANOTHER WAY COULD BE FOUND (WHETHER UNDER STATE II OF THE
1914 TREATY OR OTHERWISE) IF THE GOC WERE REALLY COMMITTED TO
FINDING A SOLUTION, THOUGH THE MECHANISM MIGHT TREAD CLOSE TO
THE MARGIN OF LEGALITY. SUCH A SOLUTION, HOWEVER,
WOULD PROBABLY SUFFER FROM THE SAME VICES FROM THE GOC
STANDPOINT AS ONE WORKED OUT THROUGH THE CONGRESS; IT WOULD
EVENTUALLY BECOME KNOWN TO UP MILITANTS (THOUGH PERHAPS SOMEWHAT
LATER) AND WOULD PRESENT A TARGET OF CRITICISM FOR OPPOSITION
SPOKESMEN. STILL, IT WOULD SEEM TO BE A POSSIBLE ALTERNATIVE.
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